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HAROLD B. WILLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 464

CHICAGO GREAT WESTERN RAILWAY COMPANY,
a corporation,

Petitioner,

vs.

LESLIE J. KENNY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Minnesota entered in the above entitled case on July 26, 1955.

OPINION BELOW

The opinion of the Supreme Court of the State of Minnesota (T. pp. 393-402) is reported in 71 N. W. 2d 669.

JURISDICTION

The judgment of the Supreme Court of the State of Minnesota was entered July 26, 1955 (T. p. 403, infra). The jurisdiction of this Court is invoked under 28 U.S.C.A. Section 1257 (3), infra (App. A).

QUESTION PRESENTED

Whether the evidence establishes causal connection between plaintiff's injuries and defendant's negligence.

STATUTE INVOLVED

The statutory provision involved is Section 51 of the Federal Employers' Liability Act, U.S.C.A., Title 45, printed in Appendix A, infra.

STATEMENT

This action was brought by plaintiff under the Federal Employers' Liability Act to recover damages for injuries allegedly caused by the negligence of the defendant on June 2, 1951, when a collision occurred between a freight train and five diesel units owned by defendant at North Hanover, Illinois. Plaintiff was working as a brakeman on the forward diesel engine of the five units. Shortly before the collision, when it appeared imminent, plaintiff descended the steps on the left side of the diesel unit, then traveling at a speed of approximately 25 miles per hour, and prepared to step off. The only evidence of the manner in which plaintiff alighted after leaving the diesel locomotive was his own testimony which unequivocally shows that at the time he landed

on the ground his body was in a backward-bending posture. The essential testimony in this respect is as follows:

"A. I dropped off on to my right heel.

Q. Right foot or right heel. Then after that your left foot came down upon the ground.

A. Yes. I let go all at once.

Q. That's the accepted and usual method of leaving the train when it is underway or when it is moving.

A. Yes.

Q. When you struck the ground after both of your feet had touched the ground, you straightened up and leaned back so that you wouldn't be pitched by the force of the movement of the train head first.

A. I didn't straighten up.

Q. Didn't you lean back?

A. I leaned back and then by straightening up you keep your balance.

Q. That's right. You leaned back because if you lean forward and bend over, the momentum would carry you ahead and you would fall.

A. That is right.

Q. So you leaned back, and by leaning back you prevented yourself from falling.

A. That's right.

Q. You ran a few steps after that.

A. Yes.

Q. Then you came to a stop without leaving your feet.

A. Yes.

Q. Isn't that correct?

A. Yes."

(T. 212-213)

The plaintiff attempted to prove that he had suffered compression fractures of the first and third lumbar vertebrae together with corresponding soft tissue injury in the lumbar

region of his back in this manner. To this end, plaintiff called one medical witness, Dr. Leonard Titrud. The undisputed medical evidence, on the basis of x-rays taken of plaintiff's back subsequent to the accident, is that there was a slight anterior narrowing of plaintiff's first and third lumbar vertebrae (T. 158-159; 270; 347).

In 1934 plaintiff, by his own admission, fell from a ladder a distance of approximately 15 feet at which time he fractured his hip resulting in plaintiff's right leg thereafter being an inch or more shorter than his left leg. This caused plaintiff to limp permanently (T. p. 139). Drs. Moe and Anderson testified that the condition of plaintiff's lumbar vertebrae following the accident was due to degenerative changes and scoliosis because of abnormal weight bearing on the spine produced, in turn, by plaintiff's hip deformity (T. 298, 348, 349).

In attempting to establish the causal relation between his injuries and defendant's negligence, plaintiff's counsel submitted a hypothetical question (T. 171-176) to Dr. Titrud, plaintiff's medical witness, which failed to include the essential fact of plaintiff's posture at the time he alighted from the moving train. The applicable portion of the hypothetical question is as follows (T. 171):

> "* * * that when the locomotive was traveling at a speed of about 25 to 27 miles an hour, he stepped off from the locomotive onto the bed of the roadway; that in so doing he first stepped in accordance with the practice of railroad brakemen in dismounting from a moving car with his right foot, which was his rear foot; that he struck on his right heel and then on his left heel; that upon striking on his heels he felt a severe shock go through both legs and up into his back and through his entire back, resulting in pain through the legs and

through the entire back; that he ran a distance until he was able to stop the momentum of his body and did not fall to the ground; * * *"

To this defendant objected (T. 174, 175). On October 25, 1954, defendant moved for judgment notwithstanding the verdict on the ground, among others, that the Court erred in denying defendant's motion for a directed verdict in his favor for the reason that as a matter of law it appeared from the evidence that plaintiff's injuries, if any, were not proximately caused by defendant's negligence. On said date, defendant concurrently moved in the alternative for a new trial on the grounds, among others, that the verdict was contrary to law, and that the Trial Court erred in permitting plaintiff's witness, Dr. Leonard Titrud, to testify over defendant's objection as to whether the alleged accident of June 2, 1951, hypothetically described by plaintiff's counsel, was the cause of plaintiff's back condition (T. 386-388). By order of November 10, 1954, the Trial Court denied both motions (T. 388-390). On November 30, 1954, defendant noticed its appeal to the Supreme Court of the State of Minnesota, and in its subsequently filed brief made the following assignments of error, among others, as follows:

"1. The Trial Court erred in overruling defendant's objection to plaintiff's counsel's hypothetical question at R. p. 171 et seq.

2. The Trial Court erred in allowing plaintiff's expert medical witness, Dr. Titrud, to give his expert opinion as to the cause of plaintiff's then present condition and injuries.

3. The Trial Court erred in denying defendant's Motion for a Directed Verdict in favor of the defendant at the close of the testimony on the ground that, as a matter of law, it appeared from the evidence that plaintiff's

injuries, if any, were not proximately caused by defendant's negligence. * * *"

The Supreme Court affirmed the judgment of the lower court, holding that there was sufficient evidence to support the jury's findings that plaintiff's alleged injuries and disability were caused by the accident (T. 400-401); and that defendant was not in a position to question the sufficiency of the foundation of plaintiff's hypothetical question to Dr. Titrud where defendant had failed to object to the hypothetical question on the ground that it assumed a material fact not in evidence and failed to move to strike such opinion testimony of Dr. Titrud (T. 395-400).

REASONS FOR GRANTING THE WRIT

1. The principal issue here, whether the evidence establishes causal connection between defendant's negligence and plaintiff's injuries, is of the utmost importance to all federal employers coming within the purview of the Federal Employers' Liability Act. Section 51 of that Act, in substance, provides that every common carrier by railroad engaged in interstate commerce shall be liable in damages to any person suffering injury while employed by such carrier where such injury results from the negligence of the common carrier or its agents. Where, as here, there is no question of the carrier's negligence, the only burden upon the injured employee is to prove that his injuries were proximately caused by the defendant's negligence.

In the instant case, plaintiff alleged back injuries. Necessarily, plaintiff in such a situation must prove the causal connection between his injuries and defendant's negligence by expert medical testimony. There was only to show upon

an adequate factual foundation that plaintiff's condition resulted from defendant's negligence. Therefore, the construction of said Section 51 of Title 45, U.S.C.A. is put in issue and a federal question arises.

The undisputed medical evidence is that if the condition of plaintiff's first and third lumbar vertebrae were caused by a fall, plaintiff necessarily would have been in a forward-flexed or forward-bending position (T. 166-167; 189-190; 270; 347). Since plaintiff's medical witness so testified, it was incumbent upon plaintiff to show that his body was in a forward-flexed or forward-bending posture at the time he stepped from the train on June 2, 1951. This he clearly did not do (T. 212-213). Or, conversely, plaintiff's medical evidence would have to show, on the basis of plaintiff's testimony as to his posture in leaving the train, that the anterior narrowing of the lumbar vertebrae was caused by his stepping from the train in a backward-bending posture. There was not, and could not be, such supporting medical testimony.

This Court can take judicial notice of the tremendous growth in personal injury litigation under the Federal Employers' Liability Act, and the relative ease with which frauds can be perpetrated against corporate defendants, unless there is some definitive rule for establishing causal connection, where, as here, defendant's negligence and plaintiff's condition are established beyond dispute.

2. The Trial Court's denial of defendant's Motion for judgment notwithstanding the verdict or for a new trial, and the Minnesota Supreme Court's decision to the effect that there was sufficient evidence of causal connection is palpably unjust and erroneous. Likewise, the Minnesota Supreme Court's decision to the effect that defendant did not object to the hypothetical question, from which alone plaintiff

could establish the causal connection, is palpably unjust and erroneous and without foundation in fact or law. Contrary to that decision, which in effect says that plaintiff didn't know what he was testifying about (T. p. 398), the record is clear that at the time plaintiff stepped back from the moving train he was in a back-bending position in the accepted and usual method of railroad brakemen dismounting.

It is only common sense that a person stepping from a moving vehicle traveling 25 miles per hour would have to lean backward and "run with the vehicle" in order to maintain his balance, and that is precisely what plaintiff testified he did. Had he bent forward in stepping from the train common sense, again, would dictate that he would be pitched headfirst, and plaintiff did not at any time fall down (T. pp. 212-213).

Further, the record clearly shows that defendant's counsel objected seasonably and adequately to plaintiff's hypothetical question (T. 174, 175). Defendant's objection that it was "* * * an improper hypothetical question * * *" was sufficient, without more, with respect to the omission by plaintiff of the essential fact of plaintiff's posture as he stepped from the moving train. Dunnell's Minnesota Digest, Section 9740. In addition to this, defendant noted an exception to the Court's ruling on defendant's objection.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

28 U.S.C.A., Section 1257:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

"(1) * * *

"(2) * * *

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question of where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 928."

45 U.S.C.A., Section 51:

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States or Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon

such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404."